Shepherd Tissue, Inc. *and* United Paperworkers International Union, AFL–CIO, CLC *and* Robert Dodson a*n*d Terry Whittier. Cases 26–CA–17062, 26–CA–17143, 26–CA–17191, and 26–RC–7710

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 1, 1997, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in response to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this case to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by polling and interrogating employees concerning their union sympathies during the course of the Union's organizing campaign, and that it violated Section 8(a)(3) and (1) by discharging, and subsequently suspending, employee Terry Whittier, and by issuing a disciplinary warning to union election observer Robert Wayne Dodson.

1. In affirming the violation found as to the warning to Dodson, we agree with the judge's rejection of the Respondent's assertion that testimonial evidence establishes that the warning was in accordance with the Respondent's policy of automatically issuing written disciplinary warnings in cases of failure to wear safety glasses while operating moving machinery, and that its treatment of Dodson was no different from its treatment of any other violator of that particular rule. On the contrary, we find that the record demonstrates that the Respondent did not follow a policy of stringent enforcement of workplace safety rules. For example, the evidence clearly shows that the Respondent was aware of employee Randy Dickerson's starting up a paper machine while oiler Willie Simer was inside it, and of employee Russell Kirkwood's lowering a paper machine's cage while Dickerson was working beneath it. In neither of these instances, where the prospect of severe injury was manifest, was any disciplinary measure imposed, nor does the evidence establish that it was even considered. Although a respondent witness testified that Respondent automatically enforced a safety glasses rule, this assertion is corroborated neither by a written policy nor by evidence of prior actual enforcement of such a rule.

2. We adopt the judge's recommended dismissal of complaint allegations relating to the Respondent's discharge of employee Tim Black Ray for threatening Willie Simer that he would start up machinery with Simer inside unless Simer removed his "Vote NO" button, and the discharge of employee Robert Wayne Dodson for presenting hangman's nooses to coworker Russell Kirkwood. In adopting these dismissals, however, we disavow the judge's findings that the General Counsel failed to establish prima facie cases of discrimination. Rather, we may infer from the credited evidence of the Respondent's knowledge of Ray's and Dodson's open and outspoken support of the Union and its unlawful polling and interrogation of its employees, that the Respondent's animus against Ray's and Dodson's prounion activities was a motivating factor in their discharges. The burden therefore shifted to the Respondent to establish that these employees would have been terminated for their misconduct in any event. We find, however, that the Respondent has met this burden. We accordingly affirm the judge's dismissal of these allegations. Thus, we find that the Respondent has established by a preponderance of the evidence that, even in the absence of their union activities, it would have terminated Ray because of Ray's threat to Simer's physical safety, and it would have terminated Dodson because he gave a black coworker a hangman's noose. That act, a graphic reminder of racial lynchings (in the South where the instant facility is located), would tend to inflame racial tensions among the predominantly minority work force.

Contrary to our dissenting colleague, we adopt and rely on the judge's findings that the Respondent had previously manifested a serious awareness and genuine concern about conduct that might inflame racial tensions, and that it had taken action on prior occasions to avert such tensions by painting over racial writings on the restroom walls.

Our dissenting colleague suggests that the Respondent previously tolerated Dodson's conduct of making and keeping nooses at his work station. The record shows only that Supervisor Faye Bradshaw observed such nooses and did not pay much attention to them. However, in the instant case, a comanager informed Area Manager Jack Besaw of the racial significance of the conduct. Besaw then realized the offensiveness of the conduct as it would appear to employee Kirkwood. Given the already charged atmosphere between Dodson and Kirkwood, we think that the Respondent acted rea-

[1] No exceptions were filed to the judge's sustaining of Employer's Objections 1, 3, and 14 in Case 26–RC–7710. A second election was held on September 25 and 26, 1997. On August 26, 1998, the Board overruled the Employer's objections to the second election and certified the Union. 326 NLRB No. 38 (1998).

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In affirming the judge's credibility resolutions, however, we disavow the judge's statement that employee Willie Simer had no motivation for lying.

sonably in discharging Dodson for that conduct. The prior permissiveness displayed by Supervisor Bradshaw, outside of a hostile context, does not warrant a contrary result.

The dissent seeks further support for finding a violation in that the Respondent discharged Dodson rather then attempting to "control" Dodson's conduct, e.g., requiring the removal of the nooses. We do not agree. There is no evidence that the Respondent followed a system of progressive discipline. In such circumstances, given Dodson's serious misconduct and its potential negative impact on the Respondent's work force, we see no basis for questioning the quantum of the Respondent's lawfully imposed discipline.

Finally, unlike our colleague, we see no disparity in the Respondent's failure to discipline employee Kirkwood. Kirkwood allegedly committed a safety infraction. Because he (and others) were not disciplined for a safety violation, and Dodson was disciplined for such a violation, we found disparate treatment and a violation. In so finding, we noted that the Respondent did not follow a policy of stringent enforcement of safety violations. The Respondent did, however, show a genuine concern about conduct that might inflame racial tensions and had acted to avert such tensions in the past. In these circumstances, the nondiscipline of Kirkwood for a safety violation does not give rise to the inference that the Respondent treated Dodson disparately by disciplining him for conduct which could inflame racial tensions.

For these reasons, we affirm the judge's dismissal of these 8(a)(3) and (1) complaint allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Shepherd Tissue, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the judge's recommended Order.

MEMBER FOX, dissenting in part.

I agree with my colleagues, for the reasons given by them, that the Respondent's unlawful polling and interrogation of employees violated Section 8(a)(1), and that its written disciplinary warning to known union adherent, Robert Wayne Dodson, and its discharge of known union adherent, Terry Whittier, violated Section 8(a)(3) and (1).[1] I dissent, however, from their dismissal of the 8(a)(3) and (1) complaint allegation relating to the termination of Robert Wayne Dodson.

According to the administrative law judge, the November 20 incident that triggered Dodson's discharge that same day began as a shouting match between coworkers Dodson and Russell Kirkwood: Dodson yelling for Kirkwood to stop lowering the paper machine's cage after Dodson observed employee Randy Dickerson inside the machine, an immediately dangerous situation; and Kirkwood shouting at Dodson for constantly yelling at Kirkwood. Thereafter, while Dodson and Kirkwood were relating their respective versions of that incident in the office of Area Manager Jack Besaw, Kirkwood interjected that Dodson, on two prior occasions in June and September, had exhibited hangman's nooses to Kirkwood and that this had offended Kirkwood. Approximately 1 hour later, Besaw, after meeting separately with Kirkwood and being informed by another manager of the significance of the hangman's noose as a symbol of racial lynchings, told Dodson that the Respondent "can't put up with that here. We're going to have to terminate you [Mr. Dodson] for intimidating another employee."

I certainly do not disagree that an employer could be legitimately concerned on learning that an employee had been displaying hangman's nooses in the workplace and had given one to a black fellow employee. However, given the General Counsel's initial showing that antiunion considerations were a motivating factor in the Respondent's decision to discipline Dodson, the issue is whether the Respondent would have taken the same disciplinary action against Dodson even absent such considerations. In my view the Respondent has not established, by a preponderance of the evidence, that it would have.

It is undisputed that at the time of his termination, Dodson was regarded by management as a good and highly experienced worker, with a clean disciplinary record except for the unlawful disciplinary warning issued the day after the election, as noted above. Uncontradicted record evidence shows that Dodson had openly made and kept such nooses at his workstation in the past, and his supervisor, Faye Bradshaw, admitted she had known of this but had not paid much attention to them. Area Manager Besaw did not even think they had any racial significance until informed by another manager. Certainly when Besaw was informed of this significance and, in particular, of their offensiveness to employee Kirkwood, he had every reason to demand that Dodson remove them from the plant and refrain from ever displaying them in the future. But up until then Dodson had never been put on notice that his display of the nooses was a dischargeable offense, nor did Area Manager Besaw have any reason to believe that he had. In the absence of any prior effort to control Dodson's conduct in this regard, I find that the Respondent's summary dismissal of him for such conduct would not have occurred in the absence of the Respondent's hostility to his outspoken support for the Union. The inference of unlawful motivation is also supported by the Respondent's failure to impose any penalty at all on Kirkwood in connection with the November 20 incident, even though it had evidence that he had committed a safety infraction that

[1] I also agree with my colleagues as to their dismissal of the 8(a)(3) and (1) allegations regarding the discharge of employee Tim Black Ray as a result of his threat to employee Willie Simer.

could have resulted in serious injury to fellow employee Dickerson.

In sum, I would find that the termination of Dodson violated Section 8(a)(3) and (1) of the Act, and I would order his reinstatement with backpay.

Jack L. Berger, Esq., for the General Counsel.
James L. Matte, Esq. (Crenshaw & Johnson), of Atlanta, Georgia, for the Respondent.
Lynn Agee, Esq., of Nashville, Tennessee, for the Charging Party, United Paperworkers International Union, AFL–CIO, CLC.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge**.** These consolidated cases were heard before me on August 19, 20, and 21, 1996, pursuant to a consolidated complaint consolidated with objections to an election pursuant to the Order of the National Labor Relations Board (the Board). The consolidated complaint was filed by the Acting Regional Director for Region 26 of the Board on March 25, 1996, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The complaint in Case 26–CA–17062 is based on a charge filed by the United Paperworkers International Union, AFL–CIO, CLC (the Charging Party or the Union) on September 29, 1995. The charge in Case 26–CA–17143 was filed by Robert Dodson, an individual, on November 20, 1995, with a second amended charge filed in that case by Dodson on March 22, 1996. The charge in Case 26–CA–17191 was filed by Terry Whittier, an individual, on December 13, 1995. The complaint as amended at the hearing, alleges that Respondent Shepherd Tissue, Inc. (the Respondent or the Employer) committed violations of Section 8(a)(1) and (3) of the National Labor Relations Act. Respondent has by its answer filed on April 8, 1996, denied the commission of any violations of the Act. The Acting Regional Director for Region 26 has consolidated Case 26–RC–7710 with these complaint cases for hearing on the Employer's Objections 1, 3, 10, 11, 14, 15, 16, 19, and 20 to an election by secret ballot conducted by the Board on October 26, 1995, among employees of the Employer in the following appropriate unit:

> All production and maintenance employees including shipping and warehouse employees employed by Shepherd Tissue, Inc., at its Memphis, Tennessee facility, excluding all office clerical employees, professional and technical employees, guards, team managers and supervisors as defined in the Act.

On the entire record in this proceeding, including my observations of the witnesses who testified here and after considering the parties' positions at the hearing and their briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that Respondent was and has been at all times material, a corporation, with an office and place of business in Memphis, Tennessee, where it has been engaged in the manufacture of paper products, that during the 12-month period ending February 26, 1996, Respondent in conducting its business operations sold and shipped from its facility goods valued in excess of $50,000 directly to points located outside the State of Tennessee and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee, and that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The complaint alleges, Respondent admits, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES[1]

A. The Alleged Interrogation and Illegal Polling

Respondent bought the assets of Kimberly-Clark in September 1994, and started up production of some of the paper products in August and September 1994 and by the fall of 1995 had approximately 375 employees many of whom had been former employees of Kimberly-Clark and members of the Union. An election campaign was initiated by certain of the employees and the Union in early 1995 with a stipulated election conducted on October 27, 1995. During this election period the Respondent held mandatory meetings with its employees. According to the unrebutted testimony of employee Robert Dodson, employees were told they would be subject to a 3-day suspension if they did not attend the meeting and would be subject to discharge if they failed to attend a meeting on a second occasion. At these meetings Plant Manager Roy Guenin was the chief spokesman for the Company and talked about production and various problems in the plant. He also spoke against the Union urging the employees to vote no at the upcoming representation election. Guenin is no longer employed by Respondent and is employed at a nearby plant but was not called to testify in this proceeding. According to the unrebutted testimony of employee Robert Dodson, which I credit, Guenin called the union representatives "cock roaches" and "thugs" and "slime." At these meetings, supervisors were also present, and there were VOTE NO buttons displayed on a deck or table in the meeting room which Guenin urged the employees to take and wear. According to the unrebutted testimony of Dodson and employee Terry Whittier, which I credit, Guenin and the supervisors attending the meeting were able to note who did or did not take a union button.

Analysis

The complaint alleges that these mandatory meetings held to campaign against the Union were utilized to illegally interrogate and poll its employees by encouraging them to take a VOTE NO button under circumstances wherein they could be readily observed by members of management and supervisors to ascertain whether or not they took a VOTE NO button. I find that this allegation has been proven by the unrebutted testimony of employees Dodson and Whittier as set out above. As the General Counsel contends, the urging by the highest official in the plant that the employees take the VOTE NO buttons in circumstances wherein they could be readily observed by Respondent's management was violative of Section 8(a)(1) of the Act as the Board has found in similar cases, *Gonzales Packing Co.*, 304 NLRB 805, 815 (1991); *Catalina Yachts,* 250

[1] The following includes a composite of the credited testimony of the witnesses at the hearing. All dates are in 1995 unless otherwise noted.

NLRB 283, 288 (1980); and *Black Dot, Inc.,* 239 NLRB 929 (1978).

B. The Alleged Interrogation of an Employee by Supervisor Faye Bradshaw

The complaint alleges that Faye Bradshaw requested an employee to wear a VOTE NO button in early October 1995. At the hearing unit employee Randy Dickerson, a line leader on the number 2 paper machine, testified that in October, his supervisor, Faye Bradshaw, approached him and asked if he "would like to wear a VOTE NO button" and he told her no. He testified that she encouraged him to wear one but "did not push it." Bradshaw denied having asked him or any other employee to wear a VOTE NO button but testified that various employees had asked her for the VOTE NO buttons.

Analysis

I credit Dickerson's testimony in this regard. Dickerson was specific in his testimony and remains a current employee there as of the date of this hearing. I thus find that Respondent violated Section 8(a)(1) of the Act by Bradshaw's unlawful interrogation of Dickerson by asking him to wear the button which request had the obvious effect of inquiring into his sentiments regarding the Union.

C. The Discharge of Tim Black Ray

Tim Black Ray was a leading advocate of the Union. He testified that the union campaign started in January 1995 and he met with union officials and distributed union authorization cards and "signed up at least 50 employees." He also took one of the employer's VOTE NO buttons and put a piece of tape with the word "YES" over the "NO" portion of the button and wore it in the plant and was observed by Team Coordinator Louis Storey and his supervisor, Debbie Farmer, wearing it. He testified he told Farmer that he supported the Union because the Respondent was firing the former Kimberly-Clark employees who had been hired by Respondent. As noted above Respondent had bought the assets of Kimberly-Clark and hired a certain number of former Kimberly-Clark employees. These employees had been represented by the Union at Kimberly-Clark and Ray had been a union steward there. He had also discussed the Union with Minnie Nolan, who was in the personnel office and had been overheard by Department Manager Ken Downing discussing the Union in the breakroom. Ray was initially employed by Respondent as a third hand on the number one tissue machine in September 1994 and was promoted to the position of back tender in February 1995. I credit the foregoing testimony of Ray. The paper machine is a large machine approximately 100 feet in length and 20 feet wide and is manned by four operators, two on the pulp machine (A and B) and two on the rewinder machine who operate as a team under the supervision of a team manager. Ray was a B operator. In order to function properly the machine must be oiled and certain of the working parts lubricated at regular intervals and as otherwise required. In order to oil the machine properly it is necessary for the oiler to enter certain parts of the paper machine which must be stopped at the time he does this or serious harm or death could occur if the machine were to be turned on while the oiler was inside the machine.

Ray testified that on one occasion on Tuesday, September 19, 1995, there were two new employees on the rewinder portion of the paper machine and he went up to the third hand (one of these two new employees) and observed that the machine was not threading as it should have been and he yelled at the third hand to start the machine which he did. The emergency light bulb was out and Gerald Rainey, the A operator, cut the machine off as Rainey had forgotten that the oiler was in the machine. Ray then saw the oiler walk out of the machine and the oiler did not seem upset. He and Rainey, apologized to the oiler. He asked the oiler if he wanted to get the emergency light fixed and the oiler said he was going to start carrying a lockout (a tag used to lock out the machine while it is being serviced) with him. He subsequently learned that the oiler was Willie Simer. He testified further that he saw Simer the following Thursday (September 21, 1995) when he and Gerald Rainey were standing by the rewinder portion of the machine. He suggested to the oiler that they call an electrician to fix the emergency light bulb and Simer said, no. Ray observed that Simer was wearing a VOTE NO button and asked him about it. Simer said that he had a prior bad experience with a union. Ray testified he told him that we (the Union) were "going to take care of people." Simer said he would look for another job if the Union came in. Ray told him he would have to get another job because the Union was coming in.

Ray testified he worked the next day (Friday) and came in on Saturday and Sunday (his days off) to train some new employees and was off work Monday. Ray testified that when he returned to work on the following Tuesday, he was called into the office to meet with Department Manager Ken Downing and Personnel Manager Beverly Bierce who told him he had been accused of making a physical threat against an employee. He asked Bierce who had accused him of making the threat and she would not tell him. He was suspended indefinitely and sent home. On Wednesday he was called to attend a meeting on Thursday morning at the plant for a meeting with Bierce and Downing. Bierce told him the oiler had filed the complaint. He told Bierce that Gerald Rainey had started the machine up and it was purely an accident. Later that day he was called by Downing who told him he had been terminated. On cross-examination he denied having told Simer to take off the VOTE NO button or he would turn the machine on. He testified that Downing knew of his prounion sympathies as did Bradshaw from hearing prior conversations in which he was engaged.

Gerald Rainey testified he was a machine operator on the number 1 paper machine and worked with Tim Ray and with two other operators on the number 1 paper machine. After he learned of Ray's discharge he talked to Downing and told him Ray was a good worker and that he had not heard the alleged threat by Ray. He testified he told Downing that in the incident prior to the alleged threat he, himself, had pulled the stop button and then saw the oiler and stopped the machine and that Ray had not started the machine but rather he had done so and that when the oiler came out they both apologized to him. He testified that the oiler should have locked out the machine and that there was no lockout tag on the machine at the time. He testified that Ray had worn a "Vote Yes" button.

Willie Simer, an oiler employed by Respondent, testified that on some of the large paper machines he is required to go inside the machine in order to oil and lubricate certain parts thereof. He testified that he always lets the operator or their assistant know that he is going into the machine. He hits the "kill" button to turn the machine off and after he is finished he turns off the "kill" button and tells the operator. This is the normal procedure he follows with paper machine number 1 as it has bearings on the back of the machine and the machine must be

stopped before he can oil it and he then tells the operators after he is finished and he has turned off the "kill" button.

Simer testified further that around September 18, 1995, he was coming out of paper machine number 1 and it started. He saw Ray and said (sarcastically) "I appreciate your starting the machine." Ray apologized to him after he said this. At the time he did not know Ray's name. No other employee came up and stated they had started the machine. He does not recall whether he was wearing a "VOTE NO" button. He testified that the person inside the machine is helpless if someone turns on the machine while the person is in there. Subsequently on another occasion when he was oiling the machine a few days later in September 1995, he came out of the machine after oiling it and Ray was there as he came out. On this occasion Simer was wearing a "VOTE NO" button and Ray told him to "take that shit (the VOTE NO button) off or the machine could be turned on while I was in there." He testified he considered this a threat. Ray told him the Union was coming into the plant no matter what Simer or anybody else said. He reported this incident to his supervisor, Bill Dunahue, who along with others brought some photos of employees for him to look at and he picked Ray out of the photos although he did not know Ray by name. He identified Ray by sight when Ray came back to work one afternoon 2 or 3 days' later. At the hearing he identified Union Exhibit 6 which is his statement that he gave to Personnel Manager Beverly Bierce. In that statement he quotes Ray as having said he may not turn the machine off the next time that Simer wanted to oil it. The General Counsel and the Charging Party argue that this supports the conclusion that at most Ray had only said he would not turn it off before Simer went in it. Dunahue testified that Simer told him that Ray had threatened to turn the machine on while Simer was in it if Simer did not remove the VOTE NO button. Kenneth Downing, who was then an area manager, testified that he met with his team managers in September 1995, shortly before Ray's termination and told them to report to him any threats made by or against any employees as there were reports of threats having been made. One of his team managers, Bill Dunahue, asked to speak to him after the meeting and told him that his oiler, Willie Simer, reported that he had been threatened by an operator. He then met with Dunahue and Simer and Simer told him that an operator had threatened to start the paper machine while Simer was in there if Simer did not remove his "VOTE NO" button. He told Simer to identify the operator and Simer pointed out Ray. Downing then talked to the human resources department and they confronted Ray on the following Wednesday and Ray denied it. Simer told him there were other people present at the time of the incident but they were not close enough to hear the comment by Ray. On Friday evening the decision was made to terminate Ray by Plant Manager Roy Guenin, Human Resources Representative, Beverly Bierce, and himself and Bierce telephoned Ray to notify him of the termination. The termination of Ray occurred on September 27, 1995. The reason listed on Ray's termination was a property rule of Respondent's regarding the sabotage of Respondent's or an employees' property.

Analysis

I find the General Counsel has failed to establish a prima facie case of a violation of the Act by Respondent's discharge of Ray. I credit Ray's unrebutted testimony that he was the leading union advocate having initially contacted the Union in early 1995, and having personally obtained 50 union authorization cards from his fellow unit employees, having worn a "VOTE NO" button with "YES" taped over the "NO" and having discussed his union support with supervisors and I find the General Counsel has established Respondent's animus against the Union by the statements made by Plant Manager Guenin. I find, however, that the General Counsel has failed to establish that Respondent's discharge of Ray was discriminatory. Here there is no evidence whatsoever that the incident between Ray and Simer was in any way contrived by Respondent's management. By both Ray's and Simer's accounts the two men did not know each other having only seen each other on a few occasions. My review of Simer's testimony convinces me that he was telling the truth when he testified that Ray told him that if he did not remove the "VOTE NO" button that the next time he went into the machine, it might be started up. Both the General Counsel and the Charging Party's counsel engaged in rigorous cross-examination of Simer and I find that Simer was steadfast, positive, and truthful in his testimony. There was no motivation for Simer to lie in this instance. Furthermore there was no evidence that either Simer or Downing jumped to any hasty conclusions in assessing Ray's conduct. Rather Simer initially identified Ray from a photograph but wanted to wait until Ray came back on duty a few days later to personally observe him and Downing also insisted on this. It is undisputed that the paper machine can be a dangerous instrumentality and that it can be life threatening. I do not credit Ray's sanitized version of what happened on the day in question but believe Simer's testimony concerning the threat issued to him which he did not take lightly as he reported it to his immediate supervisor who subsequently reported it to Downing who reviewed it with other management representatives. I also do not find determinative the testimony of Rainey that he did not hear the threat. Admittedly the machines are noisy and of considerable size and Simer testified that Ray and he were the only employees present within hearing distance at the time the threat was made. I thus conclude that Respondent's action in discharging Ray for the issuance of the threat to Simmer was a legitimate response to a serious matter that could not be ignored given Ray's ability to carry out his threat as an operator of this machinery into which Simer was required to enter to do his job. I do not find Respondent's listing of a property rule against sabotage as a reason for the discharge to be determinative. I accordingly find that the General Counsel has failed to establish a prima facie case of a violation of the Act by Respondent's discharge of Ray. Assuming arguendo that a prima facie case was established, I find it has been rebutted by the preponderance of the evidence. *Wright Line*, 251 NLRB 1083 (1980); I accordingly shall recommend the dismissal of this allegation.

D. The Warning, Suspension, and Discharge of Robert Wayne Dodson

Robert Wayne Dodson commenced his employment with Respondent in the fall of 1994, when Respondent reopened the plant it had purchased from Kimberly-Clark. Dodson was a union steward while employed at Kimberly-Clark and he became a union supporter in the organizing campaign in the fall of 1995, soliciting union authorization cards and advocating union support among his fellow employees in the breakroom. He testified that at mandatory meetings held by the Respondent to discuss the upcoming election, that Plant Manager Roy Guenin spoke against the Union and referred to the union or-

ganizers as "cockroaches," "thugs," and "slime." At one of these meetings Dodson stood up and spoke in support of the Union. I credit Dodson's testimony in this regard which was unrebutted as Guenin was not called to testify. Dodson was an observer at the election on October 26, 1995. On the day following the election Area Manager Kenneth Downing reported to Dodson's supervisor, Faye Bradshaw, that Dodson had not worn safety glasses while Dodson moved a forklift truck. Bradshaw then issued Dodson a written warning which she presented him with and she refused to rescind it when Dodson told her of the circumstances. Dodson testified that he had only moved the forklift truck a few feet to clean out the area underneath it in his department, and that he told Bradshaw this.

Dodson, who is white, was employed as a B operator (also known as a backtender) on the paper machine. The lead operator or A operator on this machine which is operated by four employees was Randy Dickerson, also white, and a longtime fellow employee at Kimberly-Clark and friend of Dodson. Dickerson served as the secretary of the Union at Kimberly-Clark. The other two operators were Russell Kirkwood and James Baker, both of whom were black. Kirkwood and Baker were relatively new employees in the papermill business.

According to Dodson on November 20, 1995, Dickerson was on his knees under the paper presses working on the machine and Kirkwood who was unaware that Dickerson was there, pushed the start button "pulling the cage down" onto Dickerson. Dodson yelled at Kirkwood, "Whoa, whoa, can't you see" or "stop" and grabbed the heavy cage to prevent it from coming down on Dickerson. He also yelled to Kirkwood, "Man, can't you see? Can't you hear? Like you could've killed this man." Kirkwood became angry and replied, "You can't holler at me." It is undisputed that the paper machines are large and noisy. At this point Dodson decided to take this matter up with supervision and he and Kirkwood went to the office of Supervisor Jack Besaw and both he and Kirkwood commenced to tell Besaw their version of events. Kirkwood was complaining about Dodson's frequent yelling at him and during this conversation in the office Kirkwood also said, according to the testimony of Dodson, "Well Mr. Dodson has done something I don't like. Mr. Dodson tied a hangman's noose out there on the floor one day, and as a black man, I'm intimidated by it." Besaw asked Dodson if he had done this and Dodson said, "Yes sir, I have tied a hangman's noose." Dodson testified he told Besaw that he had tied this knot a couple months prior thereto, and he did this as a hobby and used them at work. Besaw then talked to Kirkwood separately and then to Dodson and told Dodson in the presence of Supervisor Faye Bradshaw, "I've been around stuff like this before and we can't put up with it out here." At that point Bradshaw said, "We're going to have to terminate you, Mr. Dodson for intimidating another employee." At that point Dodson was terminated.

The General Counsel called Area Manager Besaw as an adverse witness. Besaw testified that Dodson admitted he had made hangman's nooses and given them to black employees saying, "Yes, so what." Besaw testified there were concerns in the plant about racial tension as there had been racial writings on the rest room walls. The employee complement is 80-percent black and 20-percent white. Besaw testified he spoke with Human Resources Representative Beverly Bierce and Dodson's immediate Supervisor Faye Bradshaw regarding the nooses. He testified that he was informed by them that the nooses had racial implications as symbols of the lynching of blacks in the South. Besaw testified that he, himself, was from the North and did not immediately recognize the symbolic implications of the hangman's noose. Bradshaw denied having told this to Besaw. When called to the stand in Respondent's case Besaw testified it may have been Bierce who had told him of the symbolism of the noose. According to Besaw his investigation of the matter took an hour and a half after which he decided to discharge Dodson because of the racial implications of the Act. Beverly Bierce did not testify. Bradshaw acknowledged on the stand that she had not had any prior problems with Dodson and had not paid much attention to the hangman's noose. Dickerson testified that on learning of Dodson's discharge he went to the office and told Besaw of the incident wherein Dodson had stepped in to prevent the cage from coming down on Dickerson after Kirkwood began pulling down the cage while Dickerson was down in front of the rewinder checking out the sliter holders. Dodson had yelled, "Can't you see that man under there? And he kept coming with it. And Bob said, 'Hold it, can't you see that man under there?' That's when Russell [Kirkwood] run and jumped in Bob's face, about four inches from his face, and said, I'm tired of you hollering at me," He testified that Dodson held back his hands and said let's go to the office and they did. Dickerson went to Besaw after learning that Dodson was being discharged and told Besaw he had worked with Dodson at both the Respondent and Kimberly-Clark and had never seen Dodson threaten anyone.

The General Counsel presented a black employee, Percy Chalmers, who testified he had observed the noose and never felt threatened by it and had never been threatened by Dodson. Kirkwood testified that Dodson had given him nooses on two occasions and on one of the occasions had told him to give it to black employee Percy Chalmers. Kirkwood cut it up with his knife on one occasion. On November 24, 1995, Kirkwood wrote a note to the attention of Besaw stating that Dodson had given him a hangman's noose on two occasions. The note states that "on or about the last week of June, Robert Dodson cut a piece of rope about 2-feet long and 1/4 inch diameter and tied it into a hangman's noose with 10 to 12 wraps around the loop and gave it to me, grinned and walked away. The second time the same thing happened around the second week in September. Robert didn't say anything when he gave me the nooses but to me it only symbolized lynching of blacks." James Baker also testified that he was deeply hurt by his observance of the hangman's nooses kept on the machinery by Dodson.

Analysis

I find the General Counsel has established a prima facie case of a violation of the Act by reason of the issuance of a written warning to Dodson the day following the election for driving a forklift truck a few feet without wearing safety glasses in order to clean the area underneath it. I base this on Respondent's knowledge that Dodson was a union observer at the election and a union supporter which I find has been established as Dodson was a union steward at Kimberly-Clark, solicited union cards and spoke up on behalf of the Union at a captive employee antiunion meeting held by Respondent. I find that the issuance of the written warning was an overreaction to a minor technical violation and Respondent has not shown that employees were issued written warnings for this in the past. I thus find Respondent violated Section 8(a)(1) of the Act by the issuance of the written warning to Dodson. Knowledge of Dodson's active support of the Union has been established as has anti-

union animus on the part of the Respondent and the timing of this incident the day following the election as well as the adverse action taken against Dodson all combine to establish a prima facie case of a violation of Section 8(a)(3) and (1) of the Act and I find that Respondent has failed to rebut it by the preponderance of the evidence. *Wright Line*, supra.

I find the General Counsel has failed to establish a prima facie case of discrimination by reason of Respondent's discharge of Dodson for exhibiting a hangman's noose to employee Kirkwood. I have examined all of the testimony and arguments presented by the parties and I find that Respondent's actions in discharging Dodson were not precipitous but were taken with care by Besaw whom I found to be a credible witness who testified in a low key straight forward manner. Here there is no evidence that Respondent set this situation up. Rather out of a job related confrontation between Dodson and Kirkwood, Besaw was brought into the dispute and during the course of this conversation Kirkwood asserted his complaint that Dodson was giving him hangman's nooses which he regarded as relating to the lynching of blacks in the South. I credit Besaw that he was aware of some racial tension by reason of racial writings on the rest room walls and was concerned about this in the racially mixed plant. There is no dispute that Dodson admitted having made hangman's nooses and given them to Kirkwood. Dodson contended at the hearing that he made the nooses for duck calls used for hunting utilizing a bootstring type material. He acknowledged, however, that the nooses he made at work were made of 3/8-inch thick rope, which he contended he used for work-related reasons. The sole issue is whether Respondent was merely seizing on this incident to discharge a known union adherent rather than out of concern for the operation of the plant and the safety of its employees. I find Besaw did not use this incident as a pretext but rather was genuinely concerned about the implications of this as inflaming racial tensions. As the Respondent argues in his brief Dodson is a formidable looking man in terms of physical strength at 245 pounds or somewhat less as he testified he weighed at the time of this incident. While Kirkwood was also a strong looking man although somewhat smaller than Dodson, I find Dodson's giving the hangman's noose to Kirkwood was certainly intimidating although I note that Kirkwood testified he was offended rather than intimidated by it. I cannot discern any other reason for Dodson to have acted in this manner other than to intimidate his fellow black employees. I thus find that Respondent's discharge of Dodson was not a violation of the Act. Assuming arguendo that the General Counsel established a prima facie case, I find it has been rebutted by Respondent by the preponderance of the evidence and I shall recommend the dismissal of this allegation. *Wright Line*, supra.

E. The Discharge of Employee Terry Whittier

Whittier was discharged after Supervisor Ken Downing on December 5, 1995, asked for his badge for smoking in a nonsmoking area outside the plant. Previously other employees caught smoking outside the plant in nonsmoking areas had only been suspended. It was only employees who had been caught smoking inside the plant that had been discharged. According to Whittier's unrebutted testimony which I credit, Whittier was a known union advocate who had been heard by his department manager, Downing, when he spoke in favor of union representation to his fellow employees. He had also spoke up in the mandatory employee antiunion meetings held by Respondent in opposition to Plant Manager Guenin who was speaking against the Union and stated at the meeting that unions do a lot of good things for employees. It is undisputed that on the prior shift the Respondent discharged employees for smoking in non-smoking areas outside the plant, but shortly thereafter reduced the discharges to suspensions. Respondent had only recently prior to this hearing, reevaluated the discharge of Whittier and had reduced the discharge to a 3-day suspension and had reinstated Whittier with backpay. Downing testified he did not personally make the decision to discharge Whittier and Respondent offered no evidence concerning this.

Analysis

I find the General Counsel has established a violation of the Act by reason of Respondent's discharge of Whittier which I find was motivated by Respondent's antiunion animus against Whittier as a known union supporter. Respondent's reinstatement of Whittier with backpay and the reduction to a 3-day suspension does not fully remedy the violation and I find he must be reinstated with backpay and the suspension as well as the discharge must be rescinded as the initial discharge was violative of the Act and the Respondent has failed to rebut the prima facie case of a violation by the preponderance of the evidence. *Wright Line*, supra. See *D. H. Baldwin Co.*, 207 NLRB 25, 26 (1973); *Domsey Trading Corp.*, 310 NLRB 777, 778 (1993). Re: disparate treatment.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by polling and interrogating its employees at its captive audience meeting wherein Plant Manager Guenin in the presence of Respondent's management encouraged employees to take "VOTE NO" buttons under circumstances wherein they could be observed by Respondent's management.
4. Respondent violated Section 8(a)(1) of the Act by Supervisor Faye Bradshaw's request to employee Dickerson that he take and wear a "VOTE NO" button.
5. Respondent violated Section 8(a)(1) and (3) of the Act by the written warning issued to its employee Robert Wayne Dodson.
6. Respondent violated Section 8(a)(3) and (1) of the Act by the discharge of its employee Terry Whittier.
7. Respondent did not violate Section 8(a)(3) and (1) of the Act by its suspensions and discharges of employees Tim Black Ray and Robert Wayne Dodson.
8. The foregoing unfair labor practices in conjunction with the business of the Respondent affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act including the posting of an appropriate notice.

Respondent shall be ordered to rescind the unlawful discharge (subsequently reduced to a 3-day suspension which shall also be rescinded) of employee Terry Whittier and immediately offer him full reinstatement to his former position or to a sub-

stantially equivalent position if his former position no longer exists with no loss of seniority or any other rights previously enjoyed by him, make him whole for all loss of earnings and benefits in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Election

The petition in Case 26–RC–7710 was filed on March 23, 1995. Thereafter pursuant to a Stipulated Election Agreement, an election by secret ballot was conducted on October 26, 1995, among the employees in the stipulated appropriate unit to determine the question concerning representation. The appropriate unit is:

> All production and maintenance employees including shipping and warehouse employees employed by Shepherd Tissue, Inc., at its Memphis, Tennessee facility, excluding all office clerical employees, professional and technical employees, guards, team managers and supervisors as defined in the Act.

There were approximately 351 eligible voters of whom 194 cast valid votes for and 122 cast valid votes against the Petitioner, United Paperworkers International Union, AFL–CIO, CLC. There were seven challenged ballots and no void ballots. The challenged ballots were insufficient to affect the results of the election. On November 2, 1995, the Employer filed timely objections to the election. On December 13, 1995, the Acting Regional Director filed his report on objections recommending that Employer Objections 2, 4, 5, 6, 7, 8, 9, 12, and 18 be overruled and that Objections 1, 3, 10, 11, 14, 15, 16, 19, and 20 be set for hearing before a designated hearing officer. On December 28, 1995, the Employer filed exceptions to report on objections. On May 23, 1996, the Board entered its Decision and Direction adopting the Acting Regional Director's findings and recommendations, and remanded this proceeding to the Regional Director for the direction of a hearing on Objections 1, 3, 10, 11, 14, 15, 16, 19, and 20. On June 13, 1996, Acting Regional Director for Region 26 issued an order consolidating Case 26–RC–7710 with Cases 26–CA–17062, 26–CA–17143, and 26–CA–17191 for purposes of hearing, ruling, and decision by an administrative law judge.

Objections 1 and 3

Objection 1 Threatened and coerced employees because of their activities in support of Shepherd Tissue, including threats that they would be physically harmed and injured if they did not cease such activities. Such actions by the UPIU and its employee solicitors created an atmosphere of fear and reprisal such as to render free expression of choice impossible.

Objection 3 Threatened, intimidated, and harassed certain employees by either following them home in their cars or telephoning their homes and hanging up, or making statements concerning their feelings for the Company and against the UPIU.

(a) I credit the testimony of employee Bruce Berry that in August or September 1995, he and employee Clarence Britten were in the breakroom discussing the upcoming election set for October 26, 1995, and that Dodson was sitting next to Berry and interrupted their conversation concerning how things used to be at Kimberly-Clark including employees "jumping on people" and Britten said one small employee at Kimberly-Clark had "body-slammed a big guy." Berry said although he was not employed at Kimberly-Clark, he had heard that "people came in there drunk, stuff like that." Dodson then told Berry, that "I was awful small, he could body slam me." Berry is 5 feet, 7 to 8 inches tall and weighs 130–135 pounds and estimated that Dodson was over 6-foot tall and weighed 225 to 250 pounds. At the hearing Dodson testified he was 6 foot 1-1/2 inches tall and weighed 245 pounds but had weighed less in the fall of 1995. Berry testified that they had not been talking about the Union but that they had been discussing conditions and wages at Kimberly-Clark. He testified that there were two or three other employees present at the time. In reply to Dodson he told Dodson that if he did body slam him, he would protect himself. He thereafter discussed this with Beverly Bierce of personnel and then Downing and Louis Storey but does not know what, if any actions they took. Dodson generally admitted having been involved in some conversation in the break room but testified he did not recall whether Berry was involved and denied having told Berry he could body slam him, but testified that if he said this, it was a joke and denied he had threatened Berry.

I find that Dodson did threaten Berry a much smaller employee in height and weight after having heard him and Britten discussing conditions and wages at Kimberly-Clark and employee misconduct that had occured there and that this was an act of intimidation occurring during the critical period. Dodson's threat to Berry was a response to their negative comments about employee misconduct in a unionized facility.

(b) Bobby Carr, a machine operator B who had been employed at Kimberly-Clark for 18 years, who had been a member of the Union there and a union steward for 8 years, testified that he was wearing a "VOTE NO" button and Ray told him, "That if it took six, seven or eight, whatever it took, it would be removed (in reference to the 'VOTE NO' button"). Ray is 6 foot 1 inch tall while Carr by my observation is just under 6 feet but is of a stocky build and Carr testified he is a martial arts instructor, which would explain the reference to six to eight people to remove the "VOTE NO" button from his person. Ray denied having made the threat to remove the button attributed to him by Carr. I credit Carr and I find that this conversation occurred in the critical period prior to Ray's discharge on September 27, 1995. Carr testified he gave Respondent a note concerning this 2 days after the incident. The note bears the date October 30, 1995, 2 days after the election. I conclude that Carr is mistaken about the date and that this incident occurred shortly prior to Ray's discharge. I otherwise credit Carr's testimony which was steadfast and sincere in the face of rigorous cross-examination by the Charging Party's attorney.

I find that Ray's threat to use six to eight individuals to remove the "VOTE NO" button from Carr's person was intimation of Carr for his opposition to the Union in the upcoming election and occurred during the critical period.

(c) As found supra, I credit the testimony of employee Willie Simer that Ray threatened to turn the paper machine on while Simer was in it if he did not remove his "VOTE NO" button and I find this was intimidation which occurred during the critical period.

(d) The Employer called employee Carolyn Feagin who had been an open opponent of the union campaign. She testified that in the fall of 1995, a person unknown to her came up to her as she was leaving work and walking to her car at a time when several men were passing out union literature and offered her a

piece of literature which she refused. On that day (a Thursday) she was carrying paper products (including toilet tissue) which employees are permitted to take home on Thursdays and which products were in her arms blocking view of a "VOTE NO" button she was wearing. One of the men whom she did not know attempted to hand her union literature which she refused. She showed the man her "VOTE NO" button and he told her that they needed to give her toilet paper. I credit her unrebutted testimony but find this incident falls short of constituting interference with the election. Supervisor William Dunahue testified he was walking near Feagin when she declined the offer of union literature and heard the person handing out the literature tell her "you need to put it in your bra, or something like that." This is a more specific version than Feagin gave and was qualified by Dunahue ("or something like that"), and I accordingly find that this evidence is also insufficient to support these objections.

(e) The Employer also contends that the objections should be sustained by reason of Dodson and another employee looking for Feagin after she had been named a company observer. Feagin's testimony was that on one occasion Dodson talked to her concerning representation and was nice and courteous. I find no basis for sustaining Objections 1 and 3 with respect to this incident.

(f) The Employer also contends that Objections 1 and 3 should be sustained on the basis of salaried employee Karen Dongar's testimony that she received a threatening telephone call in the middle of the night and that her car tire was flattened by a roofing nail the next morning. No evidence was presented as to the perpetrator of these incidents or to connect these incidents with the election and I thus find no basis for sustaining Objections 1 and 3 with respect to these instances.

Conclusion with Respect to Objections 1 and 3

Objections 1 and 3 are sustained with respect to incidents (a) threat to Bruce Berry, (b) threat to Bobby Carr, and (c) threat to Willie Simer but not with respect to incidents, (d), (e), and (f). I find the threats issued to Berry, Simer, and Carr all related to these employees voicing their preceived antiunion opinions or demonstrating their union sympathies and are the kind of threats of physical violence that would clearly constitute interference during the critical period with the laboratory conditions essential to a fair and free election. *Westwood Horizons Hotel,* 270 NLRB 802, 803–804 fn. 14 (1984*). Diamond State Poultry Co.,* 107 NLRB 3, 6 (1953).

Objection 10

"The UPIU and employee solicitors made offers to waive the union's initiation fees and dues."

This objection is premised on the October 23, 1995 letter sent to employees by the Union which states as follows:

> The undersigned representatives of the United Paperworkers International Union, AFL–CIO hereby pledge and guarantee the employees of Shepherd Tissue, the following conditions, upon their selecting the UPIU as their collective bargaining representative on October 26, 1995.
>
> 1. You will not pay any initiation fee to join the UPIU.
> 2. You will not pay any Union dues until we negotiate a contract you think is good enough to accept and you will not pay any back dues!
> 3. You will never be 'called out on strike' by your International Union.
> 4. You will elect your very own committee that will sit down on an equal basis with management, with the assistance of an International Represenative [sic] of the UPIU.
> 5. Your committee will negotiate over issues of vital importance to you and your co-workers, such as wages, working conditions, over-time pay, vacation pay, insurance benefits, seniority, extra pay for working 2nd & 3rd shifts, job bids, promotions and grievance arbitration procedures.
> [. . . .]
> 7. Your Union will bring democracy and respect to your work place!!
>
> This document shall hereafter be legal and binding upon the UPIU, AFL–CIO on this *23rd* day of October 1995.
>
> | | |
> |---|---|
> | */s/ Curtis Hawkins* | */s/ Ron Spann* |
> | Curtis Hawkins | Ron Spann |
> | International Organizer | International Organizer |

The Employer contends that the foregoing constitutes an unlawful attempt to garner support for the Union in the upcoming election citing *NLRB v. Savair & L. D. McFarland Co.,* 219 NLRB 575 (1975); *Lau Industries*, 210 NLRB 182 (1974). I find this objection should be overruled in accordance with the authority cited in these cases by the Union as the offer was not limited to employees who signed union authorization cards which limited offer is proscribed but rather constituted an unlimited offer that all the employees in the bargaining unit would not pay an initiation fee to join the Union and would not pay union dues until after there has been a negotiated and ratified contract between the Employer and the Union.

Objection 11 "Picketing and illegally blocked ingress and egress of employees attempting to go to work and employees exiting Shepherd Tissue."

The Employer called Security Officer Charles Phillips who testified concerning the events on the day of the election (October 26, 1995) with respect to ingress and egress. He testified that union supporters parked their cars on the street outside the plant but did not block the entrance or exit of the Employer's parking lot with the cars but, that their representatives did block the entrance and exit of the Employer's parking lot in their efforts to hand out union literature, and that he heard several loud angry exchanges but could not distinguish the words as he was some distance away. There was a policeman present and no arrests were made and he did not witness any violence.

International Union organizer Ron Spann testified he was present the day of the election for both the morning and midnight sessions. He testified no handbills were handed out on the day of the election, that eight or mine retired union members carried Vote Union Yes signs, that there was no blocking of ingress or egress and that he did not witness any disturbances between those entering and leaving the Employer's parking lot and the members carrying the union signs.

On the basis of the foregoing testimony I find the evidence is insufficient to establish any interference with the election. At most some slowdown in ingress and egress may have occurred but there has been no substantial showing of the blocking of access to and from the Employer's facility. I find this objection should be overruled.

Objection 14 "Intentionally damaged Shepherd Tissue equipment and employee vehicles."

This objection is based on several events of damage to property. Bobby Carr testified that water was put in his gasoline tank, that molasses were put in his oil and that telephone calls were made to his family which upset them during the fall of 1995. Private Security Guard Charles Phillips identified a security report prepared at his direction wherein it is noted that on October 13, 1995, approximately 16 automobiles were keyed (scratched presumably with a key). Additionally Karen Dangar testified concerning a telephone call received at her home in the middle of the night and that she found the next morning that her automobile tire was flattened with a roofing nail.

I find that this objection should be sustained as the above testimony and evidence which I credit, establishes that employees were being threatened (i.e., Berry, Carr, and Simer) and that physical damage to property was occurring so as to create an atmosphere of fear and reprisal although there was no evidence presented so as to establish the identity of the perpetrators of the physical damage to property. The test here is not to prove who was responsible for these acts but to establish whether an atmosphere of fear and reprisal was created thereby and I conclude it was. *Westwood Horizons Hotel,* supra at 803; *Diamond State,* supra at 6.

Objection 15 "Setting or attempting to set fires in the mill."

Besaw testified regarding three incidents of fires which occurred at the Employer's plant during the critical period of "possible arson." I conclude that the evidence presented was insufficient to establish that the fires were intentionally set or were so frequent and widespread as to create an atmosphere of fear and reprisal. *Westwood Horizons Hotel*, supra.

Objection 16 "Used Shepherd Tissue's intercom system to send out prounion messages."

Karen Dangar testified that the Employer's intercom system was used to announce prounion messages "Vote Yes, Vote Yes for the Union." I find nothing significant about this which would have created an atmosphere of fear and reprisal or have otherwise interfered with the laboratory conditions essential to a free and fair election.

Objection 19 "Union organizers Percy Chalmers, Ron Spann, and Curtis Hawkins trespassing on company property and harassing employees coming to and exiting the workplace."

This objection is based on an incident related earlier with respect to Carolyn Feagin's testimony concerning the attempt by an unknown individual attempting to hand her union literature and his comment to her that they (the Employer) needed to give her toilet tissue when she showed him her "Vote No" button and declined the offer of union literature. I find this evidence insufficient to establish interference with the election.

Objection 20 "Union observer Paula Jones gave false information to employees."

Carolyn Feagin testified that while she was serving as emergency relief person at the security guard shack, employee Paula Jones came up one day to sign in and upon seeing Feagin's "VOTE NO" button asked "you're voting no?" and upon Feagin's affirmative reply, said, "I've got to talk to you." Jones later came to her work station and told Feagin that she had a miscarriage on the plant floor and was required to take time off and received "a suspension for being absent X number of days." Feagin testified she checked with a personnel representative who told her they knew nothing of this alleged incident.

I credit Feagin's unrebutted testimony but find this tale by Jones does not rise to the level of destroying the laboratory conditions necessary to a free and fair election during the critical period.

Summary and Conclusions

I sustain Objections 1, 3, and 14. I find that Objections 10, 11, 15, 16, 19, and 20 should be overruled. It is recommended that the election held on October 26, 1995, be set aside and Case 26–RC–7710 be referred to the Regional Director for the setting of a new election at such time and place as he determines.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Shepherd Tissue, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Polling and interrogating its employees concerning their union sympathies.

(b) Issuing written warnings to its employees because they engage in concerted activities on behalf of a union.

(c) Suspending and discharging its employees because of their engagement in concerted activities on behalf of a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the written warning issued to employee Robert Wayne Dodson and the unlawful suspension and discharge of employee Terry Whittier and offer Whittier reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Whittier whole for all loss of earnings and other benefits suffered by him as a result of the unlawful discrimination against him in the manner set forth in the remedy section.

(c) Within 14 days from the date of this Order, remove from its files any reference to the foregoing unlawful discrimination against its employees Dodson and Whittier and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 26,

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

With respect to the alleged unlawful suspensions and discharges of Tim Black Ray and Robert Wayne Dodson, the complaint is dismissed.

IT IS FURTHER ORDERED that the election in Case 26–RC–7710 be set aside and this case be transferred to the Regional Director for Region 26 for the setting of a new election at a time and place to be determined by him.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT poll or interrogate our employees concerning their union sympathies.

WE WILL NOT issue written warnings to our employees for engaging in concerted activities on behalf of the United Paperworkers International Union, AFL–CIO, CLC.

WE WILL NOT discharge our employees for engaging in concerted activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, rescind the written warning issued to Robert Wayne Dodson and the suspension and discharge of Terry Whittier.

WE WILL make Terry Whittier whole for any loss of earnings and other benefits resulting from the discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful warning issued to Robert Wayne Dodson and the unlawful suspension and discharge of Terry Whittier, and WE WILL within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful discrimination will not be used against them in any manner.

Our employees have the right to organize and support the Union, or to refrain from doing so.

SHEPHERD TISSUE, INC.